84-1215

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

v.

DENNIS ALLEN HENDRICKS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1/8/85

QUESTIONS PRESENTED

1. Whether the conduct of an officer is "objectively reasonable" when he conducts a search pursuant to a warrant which he knows was issued without probable cause.

2. Whether a magistrate who issues a warrant which delegates the critical probable cause determination to the executing officer has abandoned his neutral and detached role in violation of Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

3. Whether the Court of Appeals for the Ninth Circuit should have remanded the case to the District Court for a determination of the "objective reasonableness" of the officer's conduct in searching Petitioner's home.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert J. Hirsh, on behalf of the Defendant, Dennis Allen Hendricks, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATION OF OPINION BELOW

United States of America v. Dennis Allen Hendricks, ___F.2d___ (No. 83-1308, 9th Cir., filed Sept.21, 1984) (App. A infra 1a-16a).

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1984. A petition for rehearing was denied on

November 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On May 16, 1983, Petitioner was charged with importation of cocaine in violation of 21 U.S.C. 952(a) and 960(a)(1) and possession of cocaine with intent to distribute in violation of 21 U.S.C. 841(a)(1) and (2). Petitioner filed a Motion to Suppress Evidence, alleging that a search of his home had been conducted pursuant to an illegally issued warrant not based on probable cause. The District Court denied Petitioner's motion to suppress and Petitioner subsequently pleaded guilty to importation of cocaine in violation of 21 U.S.C. 952(a); the count charging possession with intent to distribute was dismissed by the government. The

Petitioner was sentenced to three years imprisonment and five years of supervised probation. He appealed the denial of the motion to suppress to the Court of Appeals for the Ninth Circuit. The Court of Appeals agreed with Petitioner's contention that there was no probable cause for the issuance of a search warrant but affirmed his conviction based on its interpretation of this Court's opinion in United States v. Leon, ___U.S. ___, 104 S.Ct. 3405 (1984). See United States v. Hendricks, ___F.2d___ (9th Cir. 1984). (Appendix A (hereinafter App.) at 1a-16a).

The facts on which the magistrate based his decision to issue a search warrant in this case were that on May 10, 1983, in Los Angeles, California, United States Customs Inspector Thomas Schoeny inspected a cardboard box arriving from Brazil and addressed to Dennis Hendricks, 2835 North Sidney, Tucson, Arizona 85712. Inspector

Schoeny opened the box and found a suitcase inside. He opened the suitcase and emptied it. After becoming suspicious about the weight of the emptied suitcase, Inspector Schoeny drilled a small hole in what he believed to be a hidden compartment in the suitcase and discovered a white powder which was field tested and determined to be cocaine. Schoeny then resealed the box and forwarded the suitcase to Tucson, Arizona where it was secured by Customs officials and turned over to the Drug Enforcement Administration ("D.E.A.") officials. (App. B infra at 19a-21a.)

On the same day the suitcase arrived in Tucson, investigations of Customs and D.E.A. officials disclosed that (1) utility records for 2835 North Sidney, Tucson, Arizona, indicated that Gigi Ghazarosian and Dennis Hendricks resided at that address; (2) utility records for 2835

North Sidney reflected that Ms. Ghazarosian's previous address was 3344 North Kelvin; (3) utility records for 2835 North Sidney, Tucson, Arizona, listed the occupation of Dennis Hendricks as the self-employed operator of Brazilian Imports; (4) D.E.A. Agent Robert Eyman visually inspected the premises of 3344 North Kelvin and observed a sign on the building at that address which stated "Brazilian Imports"; (5) the vehicle of Ms. Ghazarosian was listed in the Arizona Motor Vehicle Department as registered to the address of 3344 North Kelvin, Tucson, Arizona; (6) the vehicle of Ms. Ghazarosian was parked at that time in the long-term parking section of the Tucson International Airport.

The affidavit filed with the search warrant also stated that on March 31, 1983, a greeting card from Lima, Peru addressed to Brazilian Imports, 3344 North

Kelvin, Tucson, Arizona, had arrived at the Los Angeles International Airport containing 10.4 grams of cocaine. The final piece of significant information contained in the affidavit supporting the warrant was that Dennis Hendricks had to personally claim the cardboard box arriving at the Tucson International Airport since he was the addressee.[1] (App. B infra at 25a.)

Based on this information, the United States magistrate issued a search warrant authorizing the search of the residence at 2835 North Sidney for the cardboard box, the enclosed suitcase and any paraphernalia used in the repackaging of cocaine. (App. C infra at 27a.) At the

---

[1]The package, although addressed to Dennis Hendricks, had been sent "in bond", requiring that the addressee pick up the package. The package was not to be delivered to Petitioner. United States v. Hendricks, ___F.2d at ___ (App. A infra at 2a).

time that the search warrant was issued, the cardboard box was still in the custody of D.E.A. officials at the Tucson International Airport. The magistrate added the following proviso to the warrant: "This search warrant is to be executed only on the condition that the above-described box is brought to the aforesaid premises." (App. C infra at 28a .) Special Agent David Gauthier executed the warrant on May 16, 1983, five days after its issuance, and filed a return indicating that he seized a shipment box from Brazil, a suitcase containing white powder and other items. (App. D infra at 29a.)

Petitioner's Motion to Suppress, alleging that the warrant in this case was issued without probable cause and that the magistrate had delegated his discretion to the executing D.E.A. agent was heard and denied by the District Court. (Min.Entry Order and Memorandum of Decision and

Order, (App. E and F infra at 31a-44a.)

The Court of Appeals agreed with Petitioner's contention that the search warrant was issued without probable cause, noting that "[i]f the suitcase had been in the house, or if probable cause existed to believe it was there, issuance of the search warrant would have been proper. However, at the time the warrant was issued, the magistrate knew the suitcase was in the possession of the agents, not at the house. The agents, by calling Hendricks to come for the suitcase, tried to ensure that the condition subsequent inserted into the warrant would happen." (App. A infra at 6a.) The Court of Appeals also agreed with Petitioner's complaint that the search warrant had been improperly issued by the magistrate because he delegated his judicial discretion to the executing officer. The Court concluded that "Defendant accurately per-

ceives the vice of the prospective search warrant: by issuing such a warrant, the magistrate abdicates to the D.E.A. agents an important judicial function--the determination that probable cause exists to believe that the objects are currently in the place to be searched." (App. A infra at 8a-9a).

This Court's decision in United States v. Leon, 104 S.Ct. 3405 (1984) was rendered shortly before the Court of Appeals issued its opinion in this case. The Court, citing Leon, stated that evidence obtained as a result of an invalid search warrant should not be suppressed if the officers' reliance on the warrant was objectively reasonable. Although the District Court had not ruled on the issue of good faith, and in fact had been presented with no evidence on that issue, the Court of Appeals ruled that the officers' "reliance on the

warrant was not unreasonable." (App. A infra at 14a.) Although agreeing with Petitioner that "the magistrate impermissibly delegated an element of probable cause determination to D.E.A. agents, i.e., whether the suitcase was at the house . . .", the Court refused to find that such a delegation was an abandonment of his judicial role. For these reasons, the Court of Appeals affirmed the District Court's order denying Petitioner's motion to suppress. (App. A infra at 14a).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to settle a question raised by its decisions in United States v. Leon, 104 S.Ct. 3405 (1984) and Lo-Ji Sales v. New York, 442 U.S. 319 (1979). The Court in Leon, supra held that the exclusionary sanction would not be applied to prevent "the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence obtained in

reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective." United States v. Leon, 104 S.Ct. at 3412-3413 (emphasis added). The Court went on to add "[b]ecause a search warrant 'provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime."' United States v. Chadwick, 433 U.S. 1 (1971) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)." 104 S.Ct. at 3416. The Court held in Leon that the exclusionary sanction should only be ordered in those "unusual cases in which exclusion will further the purposes of the Exclusionary Rule." 104 S.Ct. at 3419. One example cited by the Court where application of the sanction would be

proper is when the magistrate fails to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application and who acts instead as an adjunct law enforcement officer 'cannot provide valid authorization for an otherwise unconstitutional search.'" Id. at 3417 (citing Lo-Ji Sales v. New York, 442 U.S. 319, 326-327 (1979)).

This petition presents the issue of the interrelationship of the Court's opinions in Leon and Lo-Ji Sales in a clear, discreet factual setting. Here the warrant was issued without probable cause, United States v. Hendricks (App. A infra at 12a), and the issuing magistrate impermissibly delegated his discretion to the police. Id. The Fourth Amendment does not contemplate the executive officers of government as a neutral and detached magistrate. United States v. United

States District Court, 407 U.S. 297, 317 (1972). The Court of Appeals misapplied the rule of Leon, feeling it was constrained not to apply the Exclusionary Rule if "the officers' reliance on the warrant was not unreasonable." Id. Since Leon, the exclusionary sanction will not be applied to searches conducted by officers in objectively reasonable reliance on a search warrant. Massachusetts v. Sheppard, ___U.S.___, 104 S.Ct. 3424, 3428 (1984) (citing United States v. Leon). Leon does not sanction delegation of the magistrate's function to the police, as occurred here.

In Leon, 104 S.Ct. at 3417, the Supreme Court restated the time-honored principle that the Fourth Amendment contains a strong preference in favor of warrants. Accord Mincey v. Arizona, 437 U.S. 385, 390, 405 (1978), unanimous opinion; New York v. Belton, 453 U.S. 454, 457 (1981).

Magistrates are preferred in making probable cause determinations because they are neutral and impartial. United States v. Leon, 104 S.Ct. at 3417. Therefore, the inferences that a magistrate may draw from evidence are accorded far more respect than inferences drawn from the same evidence by an "officer engaged in the often competitive enterprise of ferreting out crime." Id. at 3417. Johnson v. United States, 333 U.S. 10, 13-14 (1948). In short, factual probable cause findings, whenever possible, should be made by a magistrate, not a police officer. Cf. United States v. United States District Court, 407 U.S. at 317.

All of the above was recognized in Leon. 104 S.Ct. 3416-17. But once a magistrate has performed his function by making a probable cause determination and issuing a warrant, the Leon court held that police officers can rely on that

determination and on the warrant if the reliance is objectively reasonable. Id. at 3420-22. The Court offered three examples when the reliance would not be reasonable. Id. at 3421-22. Only one of those is relevant here. Police officers may not rely on a magistrate who abandons his judicial role. Id. at 3422. The Court cited Lo-Ji Sales v. New York, 442 U.S. 319 (1979) in support of this proposition. 104 S.Ct. at 3422.

In Lo-Ji Sales, a police officer bought movies from an adult bookstore and gave them to a magistrate who determined that they were obscene. A warrant issued for the seizure of other copies of the same movies and similar films and magazines which the investigator swore were located at the bookstore. Lo-Ji Sales, Inc. v. New York, 442 U.S. at 321. In accordance with the terms of the warrant, the magistrate accompanied the police

officers to the store so that he could make an independent determination if the items in the store were obscene and therefore subject to seizure. Id. at 321-22. During the ensuing search, many magazines and films were seized. As part of the searching process, the magistrate quickly viewed the magazines and films, and if he believed they were obscene, ordered the police to seize all copies of the movie or magazine and all "similar" films or magazines. Id.

The Supreme Court held that the search was illegal because the magistrate had abandoned his role of a neutral judicial officer. Id. at 327. One of the vices pointed out by the Supreme Court was that the magistrate, by authorizing the officers to seize "similar" films or magazines, was leaving the determination of what was "similar" to the officer's discretion. This was an unconstitutional

delegation to the police of the magistrate's role in making probable cause determinations and issuing warrants. Id. As the Supreme Court recognized in Leon, no reasonable police officer may rely on a magistrate who abandons his duties to the police. 104 S.Ct. at 3422.

The magistrate in this case did exactly the same thing as the magistrate in Lo-Ji Sales. The critical finding necessary to the probable cause determination was that the box would be located in Hendricks's home. Like the police in Lo-Ji Sales who were allowed to determine for themselves which films and magazines were "similar", the D.E.A. agents in this case were allowed to determine for themselves when the box was in Hendricks's home. Thus, the police were given the power, normally reserved by the judiciary, to make the inferences that are necessary to a determination of probable cause. Compare

United States v. Leon, 104 S.Ct. at 3416 with Johnson v. United States, 333 U.S. at 13-14. It is one thing for a police officer to rely on a magistrate who apparently is performing his duties; it is quite another for a police officer to rely on a magistrate who delegates those duties to the police officer. The former is reasonable; the latter is not. United States v. Leon, 104 S.Ct. at 3421-22. Here, there is no basis for finding that the officer's conduct was "objectively reasonable". Id. at 3420-22. The officer knew, by the very terms of his affidavit, that there was no probable cause to search Petitioner's home at the time the warrant was issued. (App. B at 16a-17a.)

The magistrate gave the D.E.A. the unfettered discretion to make the finding of probable cause themselves. He did not limit the officers' actions himself; rather, he unconstitutionally left it to

the officers to impose limitations on themselves; that he was not permitted to do. Mincey v. Arizona, 437 U.S. at 395. See also United States v. United States District Court, 407 U.S. at 317. The D.E.A. agents' reliance on this delegation was not reasonable; Lo-Ji Sales, Inc. v. New York, 442 U.S. at 327; see United States v. Leon, 104 S.Ct. at 3422; they knew at the time of the issuance of the warrant that no probable cause existed therefor.

Finally, certiorari should be granted to give the court of appeals guidance on the proper course of judicial proceedings in determining the "objective reasonableness" of an officer's conduct when acting pursuant to a search warrant. Here, although the District Court was presented with no evidence concerning this issue,[2]

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[2]"THE COURT: I think, just for the record, so there's no confusion later on. Mr. Hirsh, why don't you give what your

the court of appeals inserted its judgment.

> "Although the lower court did not have occasion to determine whether the officers acted in good faith, if the record is adequate we can reach that issue for the first time on appeal since the district court's determination of good faith would be subject to de novo review as a mixed question of fact and law under United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1983) (en banc)."
> United States v. Hendricks (App. A infra at 13a.)

The issue in this case, as it was in Massachusetts v. Sheppard, 104 S.Ct. 3424 (1984), is "whether the officers reasonably believed that the search they con-

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[2] version of the facts are and see if Ms. Fiora disputes any of the facts. It's my understanding there is no disputed facts.

MR. HIRSH: Well, the facts are set forth in the affidavit and in the warrant itself. So, whether -- I don't feel there is any need to go beyond that, if the Government does present that.

THE COURT: All right, fine."
Transcript of hearing on Motion to Suppress, 7-28-83, pp.6-7.

ducted was authorized by a valid warrant." 104 S.Ct. at 3428. In Sheppard, evidence was presented to the trial court which allowed the judge to make an informed decision on whether there was an objectively reasonable basis for the officers' mistaken belief. 104 S.Ct. at 3428-3429. In the present case, no such evidence was before the trial or appellate court. The court of appeals erred in refusing to remand the case for an evidentiary hearing so that the facts surrounding the objective reasonableness issue could be determined.[3]

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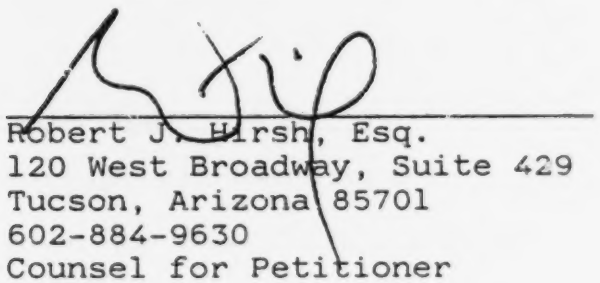
[3]Cf. Illinois v. Gates, ___U.S.___, 103 S.Ct. 2317 (1983). The Court in Gates did not consider the issue of whether the Exclusionary Rule should be modified because the issue was not raised and decided in the state court. 103 S.Ct. at 2321. The "not pressed or passed upon below" rule is a prudential restriction on the Court's review of state court decisions. Id. at 2322. One of the reasons for the rule is that "questions not raised below are those on which the record is very likely to be inadequate since it was certainly not compiled with those questions in mind." Id.

CONCLUSION

For all of the above reasons, this Petition should be granted.

RESPECTFULLY SUBMITTED.

HIRSH & FINES, P.C.



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[3](quoting Cardinale v. Louisiana, 394 U.S. 437 (1969).)

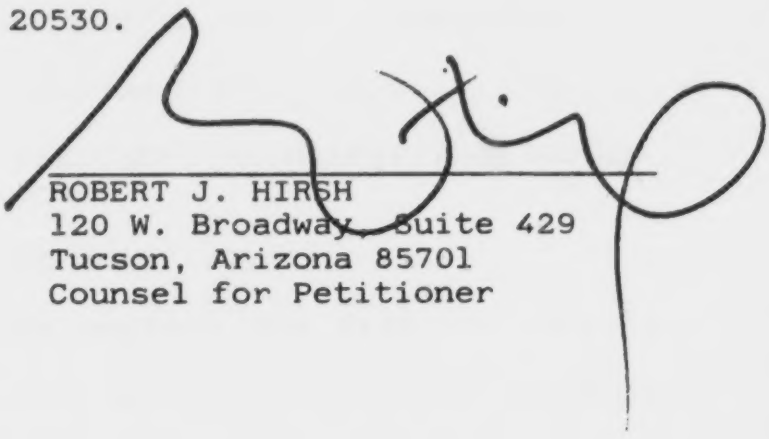
The same rationale applies to the "objective reasonableness" issue here. The issue was never raised, considered or decided by the trial court. In addition, no evidence was presented on the issue.

CERTIFICATE OF MAILING

The undersigned, a member of the Bar of the United States Supreme Court, hereby certifies that he caused to be mailed this 8th day of January, 1985, postage pre-paid, first class, the following copies of this Petition for Certiorari.

Forty (40) copies to the Clerk, United States Supreme Court, Washington, D.C. 20543; and

Three (3) copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff/Appellee,	)
	)
vs.	)
	)
DENNIS ALLEN HENDRICKS,	)
	)
Defendant/Appellant.	)
	)
	)

NO. 83-1308

D.C.NO. CR-83-164-1-ACM

OPINION

Appeal from the United States District Court for the District of Arizona
Hon. Alfredo C. Marquez Presiding

Argued and Submitted: July 10, 1984

BEFORE: FLETCHER, REINHARDT and BEEZER, Circuit Judges

FLETCHER, Circuit Judge:

Hendricks appeals the district court's denial of his motion to suppress evidence seized in a search of his residence pur-

suant to a warrant. We affirm.

FACTS

On May 10, 1983 a customs officer at Los Angeles inspected a cardboard box arriving from Brazil addressed to Dennis Hendricks, 2835 North Sidney, Tucson, Arizona. The address on the box was Hendricks's home address, but was there for identification only because the box was shipped in such a manner that Hendricks was required to pick it up personally. Inside the box was a suitcase in which the inspector found hidden 5-7 pounds of cocaine. The customs agent sent the box on to Tucson, where it was turned over to Drug Enforcement Administration (DEA) officials.

While the DEA agents were holding the box, they gathered the following additional information, which was contained in the affidavit for the search warrant:

1. Dennis Hendricks and Gigi Ghazarosian lived at 2835 N. Sidney.

2. Ghazarosian used to live at 3344 N. Kelvin.

3. 3344 N. Kelvin is the location of a business named "Brazilian Imports".

4. Dennis Hendricks is the operator of Brazilian Imports.

5. On March 31, 1983 a greeting card containing 10.4 grams of cocaine arrived at Los Angeles Airport addressed to Brazilian Imports, 3344 N. Kelvin.

6. Ghazarosian's car is registered to 3344 N. Kelvin and is in the long-term parking section of the Tucson Airport.

Upon this evidence, and knowing that the box was at the airport in the possession of DEA agents, the magistrate issued a warrant for a search of Hendricks's residence at N. Sidney. Although the warrant states that "on the premises known as 2835 N. Sidney . . . <u>there is now being concealed</u> . . . a . . . cardboard box [containing cocaine]," (emphasis added) it further states "this search

warrant is to be executed only upon the condition that the above described box is brought to the aforesaid premises" (emphasis added).

Hendricks made a motion to suppress, which was denied by the district court. Hendricks then entered a conditional guilty plea under Fed.R.Crim.P. 11(a)(2) and was sentenced to 3 years imprisonment and 5 years probation on one count of transportation of cocaine in violation of 21 U.S.C. §952(a) (1982). Hendricks appeals only the denial of the suppression motion.

DISCUSSION

We must inquire first whether probable cause existed for issuance of the warrant. If so, our inquiry is at an end. If not, we look to whether the searching officers nonetheless acted reasonably and in good faith. United States v. Leon, ___U.S.___,

104 S.Ct. 3405, 3422-23 (1984).

I

The Search Warrant Was Issued Without Probable Cause.

In making the determination as to probable cause, our role is limited to "ensuring that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Illinois v. Gates, 103 S.Ct. 2317, 2332 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). The Supreme Court has stressed that "courts must continue to conscientiously review the sufficiency of affidavits in which warrants are issued," Gates, 103 S.Ct. at 2332, see Leon, 104 S.Ct. 3422-23. The condition inserted into the warrant by the magistrate, that the warrant was not to be executed until the suitcase arrived at the house, is the principal source of our concern in this

case.

If the suitcase had been in the house, or if probable cause existed to believe it was there, issuance of the warrant would have been proper. However, at the time the warrant was issued, the magistrate knew the suitcase was in the possession of the agents, not at the house. The agents, by calling Hendricks to come for the suitcase tried to ensure that the condition subsequent inserted into the warrant would happen.[1] However, at the time the warrant issued and, in fact, until the suitcase was actually brought to the house, there was no certainty that it would ever be brought there.

In Durham v. United States, 403 F.2d 190 (9th Cir. 1968), we said, "The facts . . . must be sufficient to justify a conclusion . . . that the property which is the object of the search is probably on

the person or premises to be searched at the time the warrant is issued." 403 F.2d at 193. In Durham, the court found that the fact that property was on the premises in the past would not justify a present invasion of privacy. 403 F.2d at 194-95. In this case, the business premises were the only place that was linked to past illegal activity, the residence not at all.

The Government cites United States v. Goff, 681 F.2d 1238 (9th Cir. 1982), to support the proposition that the warrant can be prospective. In Goff a warrant was issued to search a person who was on a non-stop airplane to the district where the warrant was to be executed. Although we rejected the argument that the evidence must be physically present in the district at the time of issuance, we were concerned that "probable cause exist at the time of

the search." 681 F.2d at 1240. The warrant was proper only because probable cause existed "to believe that the person searched would arrive within the district in a reasonable time." 681 F.2d at 1240. By contrast, in this case, the agents had no information giving rise to a belief that the package would ever go to Hendricks's home. See United States v. Foster, 711 F.2d 871, 878 (9th Cir. 1983), cert. denied ___U.S.___, 104 S.Ct. 1602 (1984) (to justify the search of a residence, the facts supporting the warrant must show probable cause to believe that the evidence sought is currently in the place to be searched, (citing United States v. Valenzuela, 596 F.2d 824, 828 (9th Cir. 1979), cert. denied 441 U.S. 965 (1979) (emphasis added)).

Defendant accurately perceives the vice of the prospective search warrant: By

issuing such a warrant, the magistrate abdicates to the DEA agents an important judicial function -- the determination that probable cause exists to believe that the objects are currently in the place to be searched. The cases cited by the Government, e.g., United States v. Lowe, 575 F.2d 1193 (6th Cir.), cert. denied 439 U.S. 869 (1978); United States ex rel. Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969), are, as defendant notes, controlled delivery cases. As in Goff if the government knows that the person or object will be at a particular place at a certain time, probable cause exists to issue a warrant for a search at that time. Here, unless the suitcase were on a sure course to the house, for example, in the mail addressed to the home address, see Skaff; Lowe, no probable cause would exist to believe it would arrive there. Hendricks

had not even picked up the box at the time the warrant was issued; there was no assurance he would pick up the box or that he would take it to the house. Facts did not exist at the time the magistrate issued the warrant from which the magistrate could make the necessary judicial determination that probable cause existed.[2]

Several cases in this circuit have considered the propriety of issuing search warrants for a suspect's residence based only upon probable cause that the suspect was guilty of the underlying crime. In United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir. 1970), we observed that

> [I]t cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence. If that were so, there would be no reason to distinguish

> search warrants from arrest warrants, and cases like Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), would make little sense.

Accord United States v. Freeman, 685 F.2d 942, 949 (5th Cir. 1982). To establish the nexus between the place and the objects sought, the court may look to "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." Lucarz, 430 F.2d at 1055. See also United States v. Spearman, 532 F.2d 132, 133 (9th Cir. 1976). For example, in Lucarz, the defendant was a mail clerk at a post office accused of stealing money from a mail pouch. We observed that the defendant had ample opportunity to make a trip home to hide the stolen envelopes and that he had left the post office for 35

minutes, which was enough time to go home, but not to seek a more unusual hiding place.

In contrast to Lucarz, here there is not sufficient nexus between the box and the residence. See United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982) (Lockett had purchased a case of dynamite, had a grudge against the telephone company, a bomb had been found at a telephone company facility but the court observed, "Missing is a critical link in the chain of facts and circumstances which would lead to a reasonable belief that dynamite was improperly stored at [the residence]"). United States v. Flanagan, 423 F.2d 745, 747 (5th Cir. 1970) (affidavit revealed no factual observations that the stolen goods were at Flanagan's residence). We conclude the warrant was invalid for lack of probable cause for its

issuance.

II

Application of the Exclusionary Rule is Unwarranted in this Case.

Although the search was invalid, Leon, 104 S.Ct. at 3422, counsels (sic) that the evidence should not be suppressed if the officers' reliance on the warrant was reasonable. The standard to be employed is an objective one and the prosecution bears the burden of proof. Id. Although the lower court did not have occasion to determine whether the officers acted in good faith, if the record is adequate we can reach that issue for the first time on appeal since the district court's determination of good faith would be subject to a de novo review as a mixed question of fact and law under United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1983) (en banc).

At oral argument before our court, appellant urged that we exclude the evidence because the magistrate "wholly abandoned his judicial role . . . ." Leon, 104 S.Ct. 3422.[3] We disagree. Although the magistrate impermissibly delegated an element of probable cause determination to the DEA agents, i.e., whether the suitcase was at the house, it appears from the record that he did so in an effort to limit official conduct, not expand it. The magistrate did not abandon his judicial role to the officers, and the officers' reliance on the warrant was not unreasonable.

AFFIRMED.

FOOTNOTES

[1] The fact that the agents created the probable cause (if any) to search the house is analogous to a situation where police create exigent circumstances and then use the existence of those exigencies to justify a search. See United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980), and cases cited therein. Appellant does not rely on this argument to escape Leon, however.

[2] A preferred substitute to the procedure utilized in this case is the use of a telephonic warrant. If the agents became aware of information that led them to believe that the suitcase was in the house, they could have so informed the magistrate so that the magistrate and not the agent could make the determination of probable cause.

[3] The parties did not argue that the other two exceptions to Leon applied.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

v.

ADDRESSEE OF THE PACKAGE DESCRIBED BELOW

Docket No. 83-0373M

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: RAYMOND T. TERLIZZI, Federal Magistrate

The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as 2835 North Sidney, Tucson, Arizona, more particularly described as a single-story white stucco residence with a red tile roof and green trim around the door and windows, and with a silver mailbox situated in

front with the number "2835" thereon in the District of Arizona there is now being concealed certain property, namely a 4 feet by 3 feet by 2-1/2 feet cardboard box, wrapped in brown paper with brown tape, addressed to "Dennis Hendricks, 2835 N. Sidney, Tucson, Arizona 85712" a beige Samsonite suitcase with a false compartment consisting of fiberglass lining, five to seven pounds of cocaine, paraphernalia used in the repackaging of cocaine for sale in small parcels, including scales, cutting agents, cocaine sifters, papers and plastic bags and tapes used in packaging which constitute evidence of a violation of Title 21, United States Code, Section 841(a)(1), possession of cocaine with intent to distribute.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Please see attached affidavit.*

/s/ David P. Gauthier,
Special Agent

Sworn to before me, and subscribed in my presence.

/s/ Raymond T. Terlizzi
Federal Magistrate

*This search warrant is to be executed only upon the condition that the above described box is brought to the aforesaid premises.

AFFIDAVIT

Your affiant David Gauthier, being first duly sworn, deposes and says:

1. That he is a Special Agent with the Drug Enforcement Administration and has been so employed for the past three years, with an additional nine years of law enforcement experience.

2. That based upon the following information, your affiant requests that a search warrant be issued.

3. On May 10, 1983, a cardboard box of dimensions of four feet by three feet by two and one-half feet, arrived at Los Angeles International Airport. The box was addressed to Dennis Hendricks, 2835 N. Sidney, Tucson, Arizona 85712.

4. Because the box arrived from Brazil aboard Variga Airlines, and because Brazil is a "source" country from which large quantities of controlled substances are

imported, United States Customs inspector Thomas Schoeny inspected the box.

5. Inspector Schoeny opened the box and found a briefcase and a beige Samsonite suitcase inside. Inspector Schoeny then opened the suitcase, and observed that the suitcase contained various clothing items and other personalities. After emptying the suitcase, however, he also observed that the suitcase weighed more than an empty suitcase should. Inspector Schoeny observed what appeared to be a hidden compartment inside the suitcase located behind fiberglass lining. Inspector Schoeny then caused a small hole to be drilled into the compartment. White powder was obtained from the compartment. The powder was field tested and determined to be cocaine.

6. The suitcase was then exposed to a canine with training in narcotics detec-

tion. The canine handler, George Higgins, observed the dog "alert" to the suitcase, indicating the presence of a controlled substance in the suitcase.

7. Inspector Schoeny estimates that the suitcase contains between five and seven pounds of cocaine.

8. The suitcase was then closed and placed back into the cardboard box, which was then resealed. The box was then transported "in bond" to Tucson International Airport aboard a Republic Airlines flight from Los Angeles International Airport.

9. At approximately 3:00 p.m., the Republic Airlines flight transporting the box containing the suitcase inspected by Agent Schoeny arrived in Tucson.

10. The box was promptly secured by Customs officials who turned the box over to Drug Enforcement Administration (DEA)

officials.

11. The box is currently located at Tucson International Airport in the custody of Drug Enforcement Administration officials, awaiting the arrival of addressee Dennis Hendricks of 2835 N. Sidney, Tucson, Arizona.

12. On May 10, 1983, a check of utility records for 2835 N. Sidney, Tucson, Arizona, made by Customs Officer Brian Pledger showed that a Gigi Ghazarosian resides at that address with a Dennis Hendricks. Utility records for 2835 N. Sidney reflect that Ghazarosian has resided at 2835 N. Sidney since March 4, 1981. Utility records for 2835 N. Sidney further reflect that Ghazarosian's previous address was 3344 N. Kelvin. The check of the utilities for 2835 N. Sidney lists the occupation of Dennis Hendricks as self-employed as the operator of Brazilian

Imports.

13. On May 11, 1983, DEA Agent Robert Eyman visually inspected the outside of the premises of 3344 N. Kelvin and observed a sign on the two-story building at that address which stated "Brazilian Imports".

14. On March 31, 1983, a greeting card from Lima, Peru addressed to Brazilian Imports, 3344 N. Kelvin, Tucson, Arizona, arrived at Los Angeles International Airport. A Customs inspection of the card and envelope revealed 10.4 grams of cocaine.

15. In the experience of affiant, a quantity of cocaine weighing between five and seven pounds would necessarily be possessed for distribution to others and not for personal consumption. This is true because cocaine is always used in milligram amounts. Five to seven pounds

of cocaine consists of approximately 2,200 to 3,200 grams of cocaine.

16. In addition, in your affiant's experience, cocaine of high purity is generally used in very minute quantities or is diluted with "cutting agents" so as to produce even larger amounts of cocaine.

17. Scales for precise measuring, cocaine sifters for dilution and refinement, and various packaging items such as tapes, heat-sealed envelopes, zip-loc bags and other forms of wrappings are used by cocaine distributors to prepare cocaine for distribution.

18. The vehicle of Gigi Ghazarosian described as a 1974 mustard yellow Toyota pickup, having Arizona license number NA 8620, is currently parked in the long-term parking section of Tucson International Airport. Arizona Motor Vehicle Department records list an address of 3344 N. Kelvin,

Tucson, Arizona.

19. Because the box is addressed to Hendricks, he himself must claim the box at Customs, Tucson International Airport.

It is requested that a search warrant issue for the seizure of the box, samsonite suitcase, fiberglass lining, cocaine, scales, cocaine sifter, and packaging materials at 2835 N. Sidney, Tucson, Arizona, on the condition that the box and its contents are brought to said premises.

Further your affiant sayeth not.

/s/ David Gauthier
Special Agent
Drug Enforcement Admin.

Sworn to before me, and subscribed in my presence, May 11, 1983.

Raymond T. Terlizzi
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

v.

ADDRESSEE OF THE PACKAGE DESCRIBED BELOW

Docket No. 83-0373M

SEARCH WARRANT

To: ANY SPECIAL AGENT OF THE DRUG ENFORCEMENT ADMINISTRATION.

Affidavit having been made before me by David P. Gauthier, (sic) that he has reason to believe that on the premises known as 2835 North Sidney, Tucson, Arizona, more particularly described as a single-story white stucco residence with a red tile roof and green trim around the door and windows, and with a silver mailbox situated in front with the numbers

"2835" thereon in the District of Arizona there is now being concealed certain property, namely a four feet by three feet by two and one-half cardboard box wrapped in brown paper with brown tape, addressed to Dennis Hendricks, 2835 N. Sidney, Tucson, Arizona 85712, a beige Samsonite suitcase with a false compartment consisting of fiberglass lining, five to seven pounds of cocaine, paraphernalia used in the repackaging of cocaine for sale in small parcels, including scales, cutting agents, cocaine sifters, papers and plastic bags and tapes used in packaging.*

And as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit.

You are hereby commanded to search within a period of 10 days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search [in the daytime 6:00 a.m. to 10:00 p.m.; at any time in the day or night*] and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken and prepare a written inventory of the property seized and promptly return this warrant and bring the property before a federal judge or magistrate as required by law.

*This search warrant is to be executed only upon the condition that the above described box is brought to the aforesaid premises.

DATED this 11th day of May, 1983.

/s/ Raymond T. Terlizzi
Federal Magistrate

APPENDIX D

RETURN

I received the attached search warrant 11 May, 1983, and have executed it as follows:

On May 16, 1983 at 11:20 O'clock P.M., I searched the person or premises described in the warrant and I left a copy of the warrant with Dennis Hendricks together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

(1) Shipment box from Brazil containing clothing etc.

(2) baggies of marijuana

(1) samsonite suicase containing white powder and clothing, marijuana roaches and debris

(1) cocaine screen with residue

(6) marijuana plants

(3) scales

(1) package of photos, letters & miscellaneous papers

(1) heat sealer

(1) small glass vial with residue

(4) packages of medicine capsules contained in shaving kit

(2) small address books

(1) passport and package of stones

(1) brown carry bag containing papers and documents

(8) poppies

This inventory was made in the presence of S/A Art Hubbard and G/S Travis Kuykendall

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ David P. Gauthier

Sucscribed and sworn to and returned before me this 16 day of May, 1983.

/s/ Raymond T. Terlizzi

Federal Magistrate

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

(Tucson Globe Division)

83/164/1

Hon. Alfredo C. Marquez

Criminal Minutes, Date: August 23, 1983

USA V. HENDRICKS, DENNIS

Proceedings: X OTHER

It is ordered that the motion to suppress evidence is denied. A formal order will follow. It is ordered that this matter is set fo trial on October 4, 1983 at 9:00 a.m.

Excludable Delay

Excludable delay pursuant to 18:3161 _____ to commence on _____ and to terminate on __

___(Delay table on reverse)

___Copies issued to: Fiora, Fines; ACM

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, plaintiff

vs.

DENNIS HENDRICKS, defendant.

No. CR83-164 TUC ACM

MEMORANDUM DECISION AND ORDER

The defendant's Motion to Suppress evidence was denied on August 23, 1983. This Memorandum of Decision and Order constitutes the court's formal order.

FACTS:

Defendant Hendricks has challenged the validity of the search warrant and the supporting affidavit, claiming that there was not probable cause based upon the facts presented to the magistrate at the

time the warrant was issued. The facts examined by this court in reaching our decision were taken from the supporting affidavit.

The affiant David Gauthier supplied a four page affidavit to the magistrate wherein he indicated the following:

1. That Agent Gauthier has been employed as a special agent with the Drug Enforcement Administration (DEA) for the past three years with an additional nine years of law enforcement experience.

2. On May 10, 1983, a cardboard box arrived at the Los Angeles International Airport where it was subject to a customs inspection.

3. The box was addressed to Dennis Hendricks, 2835 North Sidney, Tucson, Arizona 85712. Based upon the inspection by the U.S. Customs Inspector, it was determined that the box contained contra-

band, 5 to 7 pounds of cocaine.

4. The box was then resealed and transported "in bond" to Tucson International Airport aboard a commercial airliner. The box was promptly secured by customs officials who turned the box over to the DEA.

5. A check of utility records for 2835 North Sidney made by customs officers revealed that Dennis Hendricks resided at that address.

6. The cocaine was of high purity so that both the purity and the amount would necessarily be possessed for distribution and not for personal consumption, based upon the experience of affiant.

7. Because of the nature of the shipment of the box it had to be picked up by the defendant himself who would claim the box at Customs, Tucson International Airport.

The affidavit requested the search warrant issue for the seizure of the box, cocaine, scales, cocaine sifter, and packaging materials at the North Sidney address. Such search was to be conducted only "on the condition that the box and its contents are brought to the premises" named in the affidavit.

The magistrate determined that there was probable cause to issue a search warrant and after naming the items requested in the affidavit, included a special condition that the search warrant was to be executed "only upon the condition that the above described box is brought to the aforesaid premises". The search warrant was issued on May 11, 1983. At the time that the warrant was issued, the box had not yet been picked up the by the defendant. On May 16, 1983, DEA officers searched the premises of 2835

North Sidney pursuant to the search warrant and seized the evidence which is the subject of this motion.

DISCUSSION:

Defendant's first grounds for challenging the validity of the search warrant is that "it purports to describe probable cause to believe that the cocaine was presently at the North Sidney address in Tucson, when in fact everybody involved knew that the package was not there." Such claims based upon an "anticipatory search warrant" and lack of present probable cause have been raised before and rejected by the courts. United States v. Lowe, 575 F.2d 1193 (6th Cir. 1978); United States v. Odland, 502 F.2d 148 (7th Cir. 1974); United States v. Outland, 476 F.2d 581 (6th Cir. 1973); U.S. Ex Rel. Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969); United States v. Feldman, 366 F.Supp. 356

(D.C. Ha. 1973).

Defendant's next challenge to the sufficiency of the search warrant is that there was no probable cause to believe that the contraband was actually at the North Sidney address based upon the facts alleged in the affidavit. Defendant argues that the DEA at best could only speculate as to where the box would be taken once the defendant picked up the package at the airport. Defendant also argues that the only connection between the package and the residence on North Sidney is that the addressee lives on North Sidney and gave that as his own on the air bill.

Recently, the United States Supreme Court in Illinois v. Gates, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), stated with respect to the magistrate's determination of probable cause:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probablility that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to insure that the magistrate had a substantial basis for * * * concluding that probable cause existed. (Emphasis added.)

Id. at 2332.

While various courts have used different terminology when discussing probable cause, see e.g. Johnson v. State, 617 P.2d 1117 "substantial probability", United States v. Nilson, 482 F.Supp. 1335 (D.C. N.J. 1980) "likely will be found", United States v. Miglietta, 507 F.Supp. 353

(D.C.M.D. Fla. 1980) "reasonable caution to believe that ---will be found---", this court must follow the "fair probability" standard of Gates and "read the affidavit as a whole in a realistic and common-sense manner" United States v. Ventrasca, 380 U.S. 102 (1965), United States v. Maestas, 546 F.2d 1177 (5th Cir. 1977).

From the affidavit, it is known that the package contains cocaine, that on the package is the name and address of the defendant, that the listed address is, according to utility records, the place of residence of the defendant. The crucial fact upon which the validity of the search warrant rests, is not, as stated by the defendant, whether delivery was actually made to the North Sidney address, but insead on whether there was "fair probability" that such delivery would be made.

In discussing the nature of a suspect's

residence, and its nexus to the criminal activity, the Fifth Circuit stated:

> The justification for allowing a search of a person's residence when that person is suspected of criminal activity is the common-sense realization that one tends to conceal fruits and instrumentalities of a crime in a place to which easy access may be had and in which privacy is nevertheless maintained. In normal situations few places are more convenient than one's residence for use in planning criminal activities and hiding fruits of a crime.

United States v. Green, 634 F.2d 222, 226 (5th Cir. 1981).

In deciding how likely the package would be taken to the North Sidney address, the court has examined the facts in a common-sense fashion and concluded that

there was probable cause to issue the search warrant.

The defendant also asserts that there was no basis other than rank speculation that the package would be picked up. There is no need to be concerned with whether the defendant would pick up the package since, had the package not been picked up, the magistrate's special condition would prevent the DEA agents from executing the warrant.

The defendant's next challenge to the search warrant is based on the "plenary discretion" of law enforcement officers concerning the execution of the search warrant. Such a claim does not withstand the logic and reasoning of the cases cited herein where the courts have authorized the use of anticipatory warrants. It is inherent in the nature of anticipatory search warrants that just such an asser-

tion will be made. In United States Ex Rel. Beal v. Skaff, supra, the Seventh Circuit noted that the magistrate knew that the warrant could not be executed until after the contraband was scheduled to be delivered. For this reason, there was no unreasonable danger of loss of judicial control over the search. Id. 433. In our facts, the magistrate himself has reduced this danger by inserting his special condition. See also 1 W. LaFave, Search & Seizure, §3.7(c) (1978) p. 703. Because there was probable cause at the time of the issuance of the search warrant, and because of the magistrate's special condition, this court finds that the defendant's challenge on this ground cannot stand.

The defendant's final ground for attacking the search warrant was that the affidavits failed to provide probable

cause that derivative contraband would be found. The court finds that United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978) is depositive on this issue. Because the affidavit points out the large quantity of cocaine and its high purity, it is normal to infer that there are other items commonly used in the importation and distribution of this contraband located at the residence. Based on the foregoing,

IT IS ORDERED that the defendant's Motion to Suppress evidence is denied.

DATED this 11th day of October, 1983.

/s/ ALFREDO C. MARQUEZ

United States District Judge

Copies mailed this date to:

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